Malaysian Preventive Detention Laws: Old Preventive Detention Provisions Wrapped in New Packages

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Abstract

Preventive detention has become a common feature of the modern democracies, including Malaysia. The Malaysian Federal Constitution in Article 149 allows the enactment of preventive detention laws without the precondition of an emergency. The Internal Security Act (ISA), 1960 was the first preventive detention law which was passed under this constitutional provision. It was enacted to deal with the armed insurgencies of the Communist Party of Malaya (CPM) and permitted the Executive to keep individuals in preventive custody for indefinite periods of time. However, a series of amendments were introduced into the ISA, which drastically broadened the scope of the exercise of the power of preventive detention by inserting new grounds of preventive detention. Additionally, an amendment introduced in 1989 took away the authority of the courts to review the lawfulness of the detention orders. The life of the ISA ultimately came to an end in 2012 when the government repealed it in the face of constant criticism from opposition political parties and human rights organisations. However, the government subsequently brought back the old draconian provisions of the ISA through the enactment of three new security laws, namely, the Security Offences (Special Measures) Act, 2012 and the Prevention of Crime (Amendment and Extension) Act, 2014 and the Prevention of Terrorism Act, 2015. Since there is a dearth of literature concerning the extent and implications of the exercise of the power of preventive detention under the new security Acts, a comparative analysis of these laws has been carried out in this Article to demonstrate how the new laws are reincarnations of the old ISA.

Keywords: Preventive Detention, Federal Constitution, Human Rights.

I. Introduction

According to the International Commission of Jurists, the power of preventive detention, due to its extraordinary nature, should only be used during an officially declared state of emergency which threatens the life of the nation.[1] Lord Atkinson in the case of *R v Halliday*[2] observed:

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1 The Oral Intervention of the International Commission of Jurists on Administrative Detention to the 41 Session of United Nations Sub Commission on Prevention of Discrimination and Protection of Minorities. U.N.Doc.E/CN.4/Sub2/1989/SR.32 at para 66, Site accessed on 15 January 2015.

2 *R v Halliday* [1917] AC 260.

> [H]owever precious the personal liberty of the subject may be there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement.[3]

Nevertheless, the power of preventive detention which has become a common feature in modern democracies is no longer contingent on the existence of an emergency which is evident from the constitutional provisions of countries, such as, India, Pakistan and Malaysia. In Malaysia, the power of preventive detention is incorporated in statutes enacted in pursuant to Article 149 of the Federal Constitution which authorises the deprivation of liberty of a person without trial during peace time.

The law which laid the foundation of the exercise of such power during peace time in Malaysia after its independence was the Internal Security Act, 1960[4] ('ISA'). Since its enactment, this piece of legislation has been constantly criticised for being oppressive and draconian in nature. This is because as from 1960 to 2012, the Malaysian government and its ruling party used the Act and its powers of endless detention to their utmost limits to silence political dissidents and government opponents.[5]

Consequently, due to extensive criticisms after 52 years of operation, Prime Minister Datuk Seri Najib Tun Razak finally on 15 September 2011 announced that this Act would be repealed.[6] Accordingly, this Act was repealed by the Security Offences (Special Measures) Act,[7] 2012 ('SOSMA'). The legacy of the preventive detention provisions of the repealed ISA, however, did not leave the Malaysian legal system and have been brought back through the new security laws enacted in pursuance of Article 149 of the Federal Constitution, namely, the SOSMA, the Prevention of Crime (Amendment and Extension) Act[8], 2014 ('PCA') and the Prevention of Terrorism Act[9], 2015 ('POTA').

Significant academic works have been carried out in relation to the ISA but there is a dearth of literature with respect to the three new security Acts which contain the power of preventive detention exercisable during peace time. An endeavour has been made in this article to examine the preventive detention provisions of these three new security laws and to shed light on the recurring features of the repealed ISA which are identifiable in these laws. This article demonstrates that within a short span following the repeal of the ISA, Parliament has revived the draconian preventive detention features of the ISA through the enactment of new security laws. An attempt has also been made to explicate the Malaysian Judiciary's conventional and illiberal response in majority of the preventive detention cases under the ISA and it is argued in this article that the Judiciary should adopt a liberal interpretative approach when reviewing the legality of detention orders under the new laws.

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3 *Ibid.* at p. 271.

4 Act A82.

5 The US Department of State, 11 March 2010, "2009 *Human Rights Report: Malaysia"*, available online at - http://www.state.gov/j/drl/rls/hrrpt/2009/eap/135998.htm. Site accessed on 4 April 2015.

6 *PM Announces Repeal of ISA, Three Emergency Proclamations*. 15 September 2011.The Star Online, http://thestar-online.blogspot.my/2011/09/star-online-nation_15.html Site accessed on 2 November 2016.

7 Act A1472.

8 Act A1459.

9 Act A769.

II. The Power of Preventive Detention and Article 149 of the Federal Constitution

At the time of the drafting of the Constitution in 1957, the country was under a state of emergency proclaimed by the Colonial Government in June 1948 to deal with the insurgency caused by the Communist Party of Malaya ('CPM'). This situation persuaded the Federation of Malaya Constitutional Commission ('Reid Commission') to recommend for the insertion of special powers against subversion in the Constitution, which would operate irrespective of any emergency. The Reid Commission in paragraph 174 of the Report of the Federation of Malaya Constitutional Commission, 1957 stated that:

To deal with any further attempt by any substantial body of persons to organise violence against persons or property, by a majority we recommend that Parliament should be authorised to enact provisions designed for the purpose notwithstanding that such provisions may involve infringements of fundamental rights or State rights. It must be for the Parliament to determine whether the situation is such that special provisions are required but Parliament should not be entitled to authorise infringement of such a character that they cannot properly be regarded as designed to deal with the particular situation.[10]

However, one of the eminent members of the Commission, Justice Abdul Hamid[11] disagreed with the recommendation for the insertion of Article 149 and opined that:

> If there arises any real emergency, and that should only be an emergency of the type mentioned in [Article 150], then and only then should such extraordinary powers be exercised. It is…. unsafe to leave in the hands of the Parliament power to suspend constitutional guarantees only by making a recital in the preamble that conditions in the country are beyond the reach of the ordinary law. Ordinary legislation and executive measures are enough to cope with a situation of the type described in [Article 149]. That article should be …omitted. There should be no half-way house between government by ordinary legislation and government by extraordinary legislation…[12]

Despite the note of dissent given by Justice Abdul Hamid, Article 149 containing the special powers to enact preventive detention laws were inserted in Part XI of the Constitution, entitled "Special Powers against Subversion, Organised Violence and Acts and Crimes Prejudicial to the Public and Emergency Powers". This enabled Parliament to enact laws to deal with circumstances prejudicial to public order and national security in a non-emergency state.[13]

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10 Report of the Federation of Malaya Constitutional Commission, 1957, Kuala Lumpur Government Printer.

11 Justice Abdul Hamid was a High Court Judge and former Secretary to the Ministry of Law in (then) West Pakistan.

12 Note of Dissent by Mr. Justice Abdul Hamid, para 13 (vii), Report of the Federation of Malaya Constitutional Commission 1957.

13 The present Article 149 of the Federal Constitution empowers the Parliament to pass special laws to prevent any substantial body of persons from taking or threatening the commission of six categories of acts stipulated in paragraphs (a-f) of Article 149(1).

Notably, the Commission, in addition to the recommendation for the insertion of Article 149, proposed for affording the detainees of preventive detention laws the right to have the lawfulness of their detention orders reviewed by the judiciary in paragraph 174 of the Reid Commission Report in the following words:

> It would be open to any person aggrieved by the enactment of a particular infringement to maintain that it could not properly be so regarded and to submit the question for decision by the Court.[14]

Nevertheless, this right is not stipulated in Article 151 of the Federal Constitution, which deals with the procedural safeguards afforded to the detainees of the preventive detention laws. The original Article 149 of the Federal Constitution, however, provided an important safeguard against the arbitrary use of the laws in Clause (2) which read as follows "A law…. shall if not sooner repealed cease to have effect on the expiration of a period of one year from the date on which it came into operation." Therefore, the law passed to deal with special circumstances would have automatically ceased to have effect within one year of its coming into force and ensure that the power of preventive detention is not misused to put the critics of the government behind the bars.

The Constitution (Amendment) Act 1960, however, amended Article 149 (2) and the present clause reads 'the Act passed under clause (1), if not sooner repealed, shall "cease to have effect if resolutions are passed by both Houses of Parliament annulling such law". Consequently, the first law, the ISA, passed under this constitutional provision continued to be in operation until 2012 when it was finally repealed by Parliamentary resolutions.

III. Abuse of Power for Preventive Detention During Peace Time

Since the power of preventive detention usually authorises the executive to deprive any person of his personal liberty for the purpose of national security, it always carries with it the risk of being abused by such authority especially when it is being exercised in a non-emergency state. In this context, the words of Lord Shaw of Dunfermline in *R v Halliday*[15] is of particular significance. Lord Shaw observed that:

> Vested with this power of proscription and permitted to enter the sphere of opinion and belief, they, who alone can judge as to public safety and defence, may reckon a political creed their special care, and if that creed be socialism, pacifism, republicanism, the persons holding such creeds may be regulated out of the way, although never deed was done or word uttered by them that could be charged as a crime. The inmost citadel of our liberties could be thus attacked.[16]

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14 Report of the Federation of Malaya Constitutional Commission, 1957, Kuala Lumpur Government Printer.
15 [1917] AC 260.
16 *Ibid.* at p. 293.

Furthermore, the absence of adequate safeguards regulating the scope of preventive detention laws facilitates the use of these laws by the executive branch of the government: a) for oppressing political opponents by putting them behind bars, and b) as a substitute for the ordinary criminal legal framework. Unfortunately, the ISA during its operation has been heavily criticised for providing such unfettered power to the executive and also for the misuse of this power for the above mentioned two purposes when it was originally enacted to combat communist activities in Malaysia.

In the case of *Tan Sri Raja Khalid Raja Harun v The Inspector-General of Police,*[17] it was alleged that whilst the applicant was a member of the loans committee of the Perwira Habib Bank, he provided consultancy services through his company, the Malayan Commercial Services Sdn Bhd. His consultancy services resulted in the loans committee approving large sums as loans to various parties, thereby causing the bank to suffer substantial losses. The applicant was arrested and subsequently detained under section 73(1) of the ISA on the basis that the police officer had

> …reason to believe that the substantial losses suffered by the bank caused by the manner in which loans were approved by the loans committee to certain parties, particularly through the acts of the applicant, has evoked feelings of anger, agitation, dissatisfaction and resentment among members of the armed forces and it is likely that such feelings may be ignited and lead to their resorting to violent action and thereby affect the security of the country.[18]

The main argument for the applicant in the hearing of the application for *habeas corpus* was that the allegations brought against him were purely criminal in nature which could have been dealt with by the ordinary criminal legislation. Furthermore, the applicant contended that none of the documents seized by the police during his arrest were subversive in nature or in any way involved matters of national security. The High Court issued the writ of *habeas corpus* and held that there was absolutely no such evidence or suggestion to indicate that the applicant will be a threat to national security except the only evidence, if at all, was the suggestion that his past acts were prejudicial to the security of the country.

Additionally, the ISA was also used as a weapon by the Government to detain persons holding views contrary to that of the ruling party. The most significant incident of misuse of the power of detention under the ISA was '*Operasi Lalang*'. On 27 October 1987, *Operasi Lalang* saw the arrests of 106 persons under the ISA.[19] Most of the detainees were prominent opposition leaders, academics, prominent human rights activists, university lecturers and businessmen.[20] They were alleged to have been involved

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17 [1987] CLJ (Rep) 1014.

18 *Ibid.* at p. 1015.

19 Yatim R, *Freedom under Executive Power in Malaysia: A Study of Executive Supremacy,* Endowment Publications, Kuala Lumpur, 1995, pp. 240-241.

20 *Ibid.* at pp. 240-241.

in activities "prejudicial to the security of Malaysia," a term often used as the basis of arrest and detention in Malaysia.[21]

Another instance of such misuse of power was the arrest of five persons in 2011 under the ISA. On April 10, 2001, Member of Parliament Chua Tian Chang, activist Hishamuddin Rais and Hulu Kelang assemblyman Saari bin Sungib were arrested under section 73(1) of the ISA. Later on April 20 and April 26, 2001, Gobalakrishnan a/l Nagapan, a former Member of Parliament and Raja Petra Raja Kamaruddin were arrested under the same section of the ISA. Subsequently the Home Minister issued detention orders against these persons pursuant to section 8 of the ISA. They were detained in relation to a "Black 14" rally to mark the second anniversary of the conviction of the opposition party advisor Datuk Seri Anwar Ibrahim for abuse of power. These individuals were later released in June 2003. They sued the Inspector General of Police, the Home Ministry and the government for unlawful detention under the ISA and for defamation.[22] The Court of Appeal found that

> ...the instant case involved not persons in criminal activities for personal gain, but persons in political activities whom the police stated it 'had reason to believe' was involved in activities prejudicial to the security of Malaysia but at the trial, neither evidence for such reason to believe was produced nor reasons for the failure to do so was presented in the trial, leading to the conclusion there was no basis for the arrest and detention, and that the plaintiffs were arrested for their political activities. The grounds of detention were frivolous and devoid of merit, the detainees were not a threat to the security and that they were detained for their political beliefs.[23]

IV. Preventive Detention Laws that Methodically Replaced the ISA

The ISA was officially repealed by the SOSMA in 2012. However, the repeal of the ISA did not affect the detention orders issued under it; therefore individuals detained in pursuance of the ISA are still interned.[24]

The SOSMA is basically a procedural law which does not lay down the offences but only the procedure to be followed when a security offence has been committed under certain sections of the Penal Code and the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. This law only enables the police force to detain a person for a maximum of 28 days without trial.

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21 *Ibid.* at pp. 240-241.

22 *Appeals court awards RM4.55m to Tian Chua, Hishamuddin Rais, 3 others*. 12, December 2014. The Sun aily. http:// www.thesundaily.my/news/1265144 Site accessed on 29 November 2015.

23 *Tan Sri Norian Mai & Ors v Chua Tian Chang & Or*s [2015] 4 MLJ 464, 485.

24 The SUHAKAM (the Human Rights Commission of Malaysia) in its Annual Report of 2012 urged the Government to release the 15 people detained under the ISA as of 10 July 2013 as the ISA has already been repealed.

It is noteworthy that in 1960, the Government retained power of preventive detention which was available under the Emergency Regulations of 1948 and preserved it through sections 8 and 73(1) of the ISA when the Regulations was repealed. In 2011, the three Proclamations of Emergency – 1966, 1969 and 1977 – were lifted which rendered the Emergency Public Order and Prevention of Crime Ordinance 1969 (EO)[25] void and in 2012 the ISA was repealed. As a result, the Government was only left with the power of 28 days of preventive detention under the SOSMA and felt the need to resuscitate the draconian preventive detention provisions of the ISA.

Accordingly, the Prevention of Crime Act 1959 was extensively amended and extended in 2014 through a new Act, the Prevention of Crime (Amendment and Extension) Act 2014. This piece of legislation contains the recital of Article 149 in its preamble as it is the only condition precedent[26] for the enactment of a special law under this particular Article of the Federal Constitution and brought back the oppressive provision of indefinite detention without trial. The PCA came into effect on 2 April 2014.

Following the passage of the White Paper titled 'Towards Combating the Threat of the Islamic State' on 26 November 2014 in Parliament, the Government promised to enact a new law to reflect the concerns in the White Paper.[27] The Prime Minister, Datuk Seri Najib Tun Razak, urged the country's parliament to adopt stronger legal safeguards against terrorism.[28] In particular, he expressed concern about Malaysian citizens returning home with extremist views after having fought beside Islamic State (IS) militants in Syria and Iraq, noting that 39 citizens had already joined IS and that its radical ideology should not be allowed to spread.[29] Home Minister Dato' Seri Dr Ahmad Zahid Hamidi, in debating the Prevention of Terrorism Act 2015 (POTA), asserted that terrorism is a real threat and preventive measures must be carried out.[30] Giving effect to the concerns of the Government, the POTA was passed by a majority of 79-60 after more than 12 hours of debate[31] and came into effect on 1 September 2015. Similar to the ISA and PCA, this Act contains the harsh provision of indefinite detention without trial.

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25 This Emergency Ordinance which provided for the power of preventive detention ceased to exist in accordance with Article 150 (7) of the Constitution within six months from the date on which the Proclamation of Emergency was lifted.

26 Lord Diplock in the case of *Teh Cheng Poh v Public Prosecutor* [1970] 1 MLJ 101 at p.103 stated that "On the face of it the only condition precedent to the exercise by Parliament of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating that something had happened in the past viz. that action of the kind described "has been taken or threatened". It is not even a requirement that such action should be continuing at the time the Act of Parliament is passed."

27 Bilveer Singh, 7 April "New Law Gives Malaysia Teeth in Fight Against Terror" NUS Website, available online at - https://news.nus.edu.sg/news-media/8839-new-law-gives-malaysia-teeth-in-fight-against-terror Site accessed on 2 November 2016.

28 Wendy Zeldin, *Malaysia: Anti-Terrorism Law Proposed*. Library of Congress, Global Legal Monitor, available online at- http://www.loc.gov/law/foreign-news/article/malaysia-anti-terrorism-law-proposed/ Site accessed on 2 November 2016.

29 *Ibid.*

30 Vasudevan Sridharan*, Malaysia passes controversial anti-terror bill stoking concerns among activists,* International Business Times, 7 April 2015, available online at - http://www.ibtimes.co.uk/malaysia-passes-controversial-anti-terror-bill-stoking-concerns-among-activists-1495164 Site accessed on 2 November 2016.

V. Similarities Between the ISA, SOSMA, PCA And POTA

This section of the article demonstrates that the harsh preventive detention provisions of the ISA have been resurrected through the three new security laws and these laws, in the absence of adequate safeguards, provide opportunities for abuse of the power of preventive detention by the executive branch, similar to the ISA.

A. Grounds of Preventive Detention

This point will be discussed in two parts, namely, in Part (1), light will be shed on the ambiguous and vague grounds of preventive detention and in Part (2), attention will be drawn towards the amendments made by Parliament to broaden the scope of those grounds.

(1) Obscurity of the Grounds of Preventive Detention

The ISA provided for two types of preventive detention, namely, police detention under section 73 and Ministerial detention under section 8. Under section 8 of the ISA, if the Minister was satisfied that a person has acted in a certain manner which was prejudicial to the security of Malaysia or maintenance of essential services or economic life then the Minister was empowered to direct the detention of a person for a period not exceeding two years.

Difficulties and debates were always encountered in interpreting the grounds of detention under the ISA, as the phrase 'acts prejudicial to the security, maintenance of essential services or economic life' were not defined in the Statute. Therefore the acts which could amount to prejudicial actions were ambiguous. The Minister was the sole judge to decide whether a person had committed such a prejudicial act under the ISA.

Malaysia followed the subjective satisfaction test propounded by the majority of the judges in the infamous case of *Liversidge v Anderson*[32]. In this case, the appellant was detained under a detention order issued pursuant to Regulation 18B of the Defence (General) Regulations 1939[33] in the midst of World War II. The House of Lords decided against the appellant by a majority of four to one (Lord Atkin dissenting) and held that a subjective approach was relevant when reviewing the legality of the detention order made by the Secretary of State.[34] Lord Macmillan was of the view that the executive's belief should not be measured against the objective standard but against that of the Secretary of State's personal standard.[35]

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31 *Ibid.*

32 [1942] AC 206.

33 This Regulation was made under the authority of the Emergency Powers (Defence) Act 1939 which authorised the enactment of regulations which provided for the detention of persons in the interest of public safety or the defence of the realm.

34 *Supra* n 32, at p. 213

35 *Supra* n 19, at p. 267.

The majority decision of this case was strongly embraced in Malaysia through the Federal Court decision in the leading case of *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs)*[36]. In this case, the Court was asked to review a detention order issued under section 8 of the ISA. The Federal Court refused to interfere with the discretionary power vested in the enabling authority and abstained itself from determining the relevancy and sufficiency of the allegations of fact and grounds of detention communicated to the detainee.

Ironically, the PCA and POTA also provide for indefinite period of detention identical to the repealed ISA but the enabling authorities are different, namely the Prevention of Crime Board and the Prevention of Terrorism Board.

Under the PCA, the Inquiry Officer first decides whether a person falls under the Registrable Category and consequently, the Board 'may' in accordance with section 19A(1), "after considering the report of the Inquiry Officer submitted under section 10 and the outcome of any review under section 11, direct that any registered person[37] be detained". The further detention of the same person by the Board depends on its satisfaction of the fact that "such detention is necessary in the interest of public order, public security or prevention of crime".[38] These terms, similar to the ISA, are not defined in the PCA and their interpretation depends on the good judgment of the Prevention of Crime Board.

Similarly, under section 13(1) of POTA, the Board, if after considering the complete report of the investigation submitted under section 3(4) and the report of the Inquiry Officer submitted under section 12,

> is satisfied with respect to any person that such person has been or is engaged in the commission or support of terrorist acts involving listed terrorist organizations in a foreign country or any part of a foreign country, the Board may, if it is satisfied that it is necessary in the interest of the security of Malaysia or any part of Malaysia that such person be detained, by order ("detention order") direct that such person be detained.

The words 'terrorist acts' and 'listed terrorist organisations' are not defined in the POTA, but the Act refers to other statutes for the definition of these terms. Section 2 POTA states that the term 'terrorist act' will have the same meaning assigned to them in section 130B (2), Chapter VIA of the Penal Code.

Moreover, section 2 of POTA states that 'listed terrorist organisation means any specified entity declared under sections 66B and 66C of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001'. However, Parliament had abstained from defining other significant words used in section 13(1), for

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[36] [1969] 1 LNS 65.

[37] Registered person is someone who falls under the Registrable Category which refers to nine categories of activities prescribed in the First Schedule of the Prevention of Crime Act, 1959.

[38] Section 19A(1), Prevention of Crime (Amendment and Extension) Act 2014, Act A1459.

instance 'engaged', 'commission', 'support' and 'involving'. According to the Malaysian Bar, due to the use of these words,

> the reach of the legislation is extremely wide and lends itself to abuse. It opens up the possibility that almost anyone could be targeted under POTA. We have seen how ISA, which had been meant to deal with the communist insurgency, was used to stifle political dissent and imprison political opponents.[39]

Thus, similar to the ISA, these Acts also contain broad and vague grounds for preventive detention and consequently make the power of preventive detention easily susceptible to exploitation by the executive.

(2) Broadening the Scope of Preventive Detention through Amendments

In addition to the original ground, two new grounds – actions alleged to be "prejudicial to the maintenance of essential services" and actions "prejudicial to the economic life of Malaysia" were incorporated in sections 8 and 73 through the Internal Security (Amendment) Act 1971[40]. It is noteworthy that the ground 'prejudicial to economic life' does not appear in Article 149 of the Constitution which would entitle Parliament to enact a security law on that ground.

Moreover, the ISA was originally enacted to combat communist insurgency but in a number of cases, the Judiciary decided that the scope of this law should not be confined to communist activities only. The Judiciary in both the cases of *Theresa Lim Chin Chin v Inspector General of Police,*[41] and *Mohd Ezam Mohd Noor v Ketua Polis Negara & Other Appeals,*[42] held that there was nothing in Article 149 of the Federal Constitution or in the ISA that gave rise to the interpretation that the latter was limited in its application to the communist threat only.

The grounds for detention under the ISA were broadened almost 11 years after its enactment but within two years of its coming into effect, SOSMA was amended through the Security Offences (Special Measures)(Amendment) Act 2014[43] which broadened the list of security offences enumerated in the First Schedule. The Amendment Act included in the First Schedule, in addition to Chapters VI and VIA, Chapter VIB of the Penal Code and Offences under Part IIIA of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.

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39 Steven Thiru, 5 April 2015, *Press Release: Prevention of Terrorism Bill 2015 Violates Malaysia's Domestic and International Commitments, is an Affront to the Rule of Law and is Abhorrent to Natural Justice*, The Malaysian Bar http://www.malaysianbar.org.my/press_statements/press_release_%7C_prevention_of_terrorism_bill_2015_violates_malaysias_domestic_and_international_commitments_is_an_affront_to_the_rule_of_law_and_is_abhorrent_to_natural_justice.html Site accessed on 14 August 2015.

40 Human Rights Commission of Malaysia, 2003, *Review of the Internal Security Act, 1960,* p- 65 < http://www.suhakam.org.my/wp-content/uploads/2013/12/review-of-the-ISA-1960.pdf> Site accessed on 13 August 2015.

41 [1988]1 LNS 132.

42 [2002] 4 CLJ 309.

43 Act A1472. The Act came into force on 31 December 2014.

In the same vein, reference can also be made to the First Schedule of the PCA which defines the expression '*registrable categories'*. Paragraph 2 of the original First Schedule of the Prevention of Crime Act, 1959 listed as a registrable category, "Persons who belong to any group, body, gang or association of five or more persons who associate for purposes which include the commission of offences involving violence or extortion." Notably, no amendments were brought to the First Schedule through the PCA, 2014 but later a new paragraph 2 was introduced in the PCA by the Prevention of Crime (Amendment of First and Second Schedule) Order 2014 which is significantly wider in scope than the original provision. The new paragraph 2, of the First Schedule reads as follows – "Persons who belong to or consort with any group, body, gang or association of two or more persons who associate for purposes which include the commission of offences under the Penal Code".

Significantly under the new paragraph 2 of the PCA, it is no longer necessary for an offence to be committed under the Penal Code; it will suffice that the person concerned "*consorts"* with at least one other person for purposes which include the commission of offences under the Penal Code.[44] Following in the footsteps of the ISA, the grounds for preventive detention under these new Acts are also being constantly amended to broaden the scope of the power of preventive detention.

B. The Power of Preventive Detention Still Rests with the Executive

The ISA authorised the Minister under section 8 to preventively detain a person for an indefinite period of time. In both the PCA and POTA, this power is given to respective Boards, namely, the Prevention of Crime Board and Prevention of Terrorism Board, which consist of members appointed by the *Yang di-Pertuan Agong* (the King). It is pertinent to highlight here that Article 40(1) of the Federal Constitution provides that "In the exercise of his function under this Constitution or federal law the *Yang di-Pertuan Agong* shall act in accordance with the advice of the Cabinet….". Thus, it is obvious that the executive will be in a position to influence the appointment of the members of the Board.

Nevertheless, the PCA 2014 required the Chairman of the Prevention of Crime Board to be a person "who was or is or has the qualification to be a judge of the Federal Court, Court of Appeal or High Court"[45]. Following from this, the possibility of the abuse of such power was comparatively lesser. However, within one year, through the Prevention of Crime (Amendment) Act 2015, this provision has been amended and Parliament made the composition[46] of the Prevention of Crime Board provided in section 7B identical to the composition of the Prevention of Terrorism Board[47] stipulated in section 8 of

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44 Lau Sara, *Old Wine In A New Wineskin?* http://www.skrine.com/publications/legal-insights/639-old-wine-in-a-new-wineskin Site accessed on 13July 2015

45 Section 7B(1)(a), Prevention of Crime (Amendment and Extension) Act 2014 Act, A1459.

46 Previously section 7B of the PCA provided that the Board shall comprise of a Chairman and four other members appointed by the *Yang di-Pertuan Agung*.

47 The composition of the Prevention of Terrorism Board is stipulated in section 8 of the POTA and it states that the Board shall comprise of a Chairman, Deputy Chairman and not less than three and not more than six other members.

the POTA. Both sections 7B and 8 of the PCA and POTA respectively only require the Chairman of the Boards to be a person who has at least 15 years of experience in the legal field. Moreover, there are no prerequisites enumerated for the appointment of the deputy chairman and other members of the Board in the respective Acts.

Additionally, the termination of the members of the respective Boards is also dependent on the *Yang di-Pertuan Agong* by virtue of sections 7B(4)[48] and 8(4) of the PCA and POTA respectively. Therefore, it can be argued that the particular Boards cannot be expected to be free from executive influence when the powers of appointment and termination of the Boards are indirectly entrusted on the executive as the *Yang diPertuan Agong* acts on the advice of the Cabinet.

Non-governmental organization, *Suara Rakyat Malaysia* (SUARAM) in the Human Rights Report, 2014 in relation to the Prevention of Crime Board stated that "the purported safeguard to the Act [the PCA], the Prevention of Crime Board is merely cosmetic and ineffective"[49]. Furthermore, the identity of the appointees of the Board is also shrouded in secrecy as the Home Minister only revealed that "they were individuals of high integrity with more than 27 years of experience in the field of security. They are also law practitioners of good credentials".[50] The Malaysian Bar, with reference to the Prevention of Terrorism Board, opined that:

We have seen from the practice of POCA [the PCA] that the names of the members of the Prevention of Crime Board have not been made public. It is likely to be no different for members of POTB. The fact that POTB hearings will not be held in public means, in effect, that POTA will allow secret hearings by a secret panel. There will be no transparency.[51]

Moreover, the Inquiry Officer, based on whose report the respective Boards under both the Acts will direct the detention of individuals, is also appointed by the Minister.

C. *The Duration of Preventive Detention without Trial*

The ISA through section 8(1) sanctioned the deprivation of liberty of a person for a period not exceeding two years which was renewable for an indefinite period of time.[52] The renewal may be made either on the same grounds on which the original order was made or on different grounds or partially on the same and partially on different grounds.

In the years 2014 and 2015, Parliament has ornamented both the PCA and POTA with the power to detain a person for an indefinite period of time similar to the ISA. The PCA and POTA, in sections 19A(1) and 13(1) respectively authorise the Prevention of Crime

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48 When the PCA came into force it did not empower the *Yang di-Pertuan Agung* to terminate the members of the Board but subsequently through the Prevention of Crime (Amendment) Act 2015 new section 7B(4) was inserted.

49 Suara Rakyat Malaysia (SUARAM), *Malaysia: Human Rights Report 2014,* at p. 5, available online at - http://www.suaram.net/wordpress/wp-content/uploads/2014/12/Suaram-Human-Rights-Overview_2014_9-Dec.pdf. Site accessed on 1 April 2015.

50 *Ibid.*

51 *Supra* n 39.

52 Section 8(7) Internal Security Act 1960, Act 82.

Board and Prevention of Terrorism Board to detain a person for a period not exceeding two years which can be further extended[53] to a period not exceeding two years at a time.

Even though SOSMA in section 4(5) has reduced the period of police detention from a maximum 60 days (under the ISA) to a maximum of 28 days but it should be stressed here that originally, under the ISA, the duration of police detention was also less – a maximum of 30 days under section 73(3). But subsequently, through the Internal Security (Amendment) Act, 1971 it was increased to 60 days.

According to the Explanatory Statement accompanying the Bill for the Amendment Act, it was stated that the increase in the length of the detention was made "based on difficulties which have arisen in practice".[54] From the Parliamentary Debates of 30 July 1971, it appeared that the practical difficulties referred to in the Explanatory Statement to the Bill was the apparent insufficiency of 30 days for the files of a person detained under section 73 to be brought from the police at contingent level to the headquarters of the police force and subsequently to the Minister.[55] SUHAKAM, however, commented that the rationale behind the increase in length of detention under section 73 of the ISA was no longer a valid reason given the advancement in telecommunication and transportation technology in this day and age.[56]

The ISA has been amended a number of times, resulting in harsher provisions on preventive detention. As the SOSMA has similarly been amended several times after it was first introduced in 2012, there is a risk that the duration for police detention may also be increase, thereby following the trend set by the ISA. SOSMA, however, in section 4(11) provides a sunset clause[57] which states that – "subsection (5) shall be reviewed every five years and shall cease to have effect unless, upon the review, a resolution is passed by both Houses of Parliament to extend the period of operation of the provision". Except for SOSMA, the other two security laws do not contain such sunset clauses.

D. *Right to Judicial Review of the Detention Order*

Article 5(2) of the Federal Constitution safeguards the right to liberty of a person, by allowing an unlawfully detained person to make a complaint to the High Court or any judge against such detention order and be subsequently released.

Notably, the proviso to Article 149 only validates a law passed under Article 149 (1) notwithstanding its inconsistency with Article 5. But neither Article 5 nor Article 149 expressly mention that the rights provided in Article 5 shall not be available to a person detained under such preventive detention laws. This is in contrast to the express prohibition in Article 22 of the Indian Constitution which in subsections (1) and (2) provide protection

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53 Section 19A (2) Prevention of Crime (Amendment and Extension) Act 2014, Act A1459 and section 17(1) (a), Prevention of Terrorism Act 2015, Act A769.

54 *Supra* n 40, at p.37

55 Parliamentary Debates, Dewan Rakyat, 30 July 1971, p. 4095.

56 *Supra* n 40, at p. 67

57 Sunset clauses are a mechanism to acknowledge the extraordinary and therefore temporary nature of the powers under the security laws, as Parliament will review such power periodically and renew it only if a majority of the Parliament decided it is still required. Surabhi Chopra, "National Security Laws in India: The Unraveling of Constitutional Constraints", *Oregon Review of International Law,* 2015, 17(1), p.42

against arrest and detention by affording an individual with certain rights, that is, right to be informed of the grounds of arrest, right to be defended by a legal practitioner of his choice and brought before a magistrate within 24 hours of arrest. In the absence of such express prohibition in Article 5 or Article 149 of the Federal Constitution, the right to have the lawfulness of the detention order reviewed by a court of law both on substantive and procedural grounds should be available to the detainees of the security laws.

Accordingly, this right was given to the detainees under the original ISA. The Internal Security (Amendment) Act, 1989, however, introduced subsections 8A, 8B, 8C and 8D which unduly restricted the ambit of judicial review of the Ministerial detention order issued under section 8 of the ISA. The Prime Minister while tabling the Internal Security (Amendment Act) explained the main concern behind the amendment of the ISA as follows:

> The interventionist role of judicial decisions and the trends of foreign courts should not be copied because such actions were against the concept of separation of powers between the executive and the judiciary which was upheld in Malaysia. If the courts can reverse executive's decision, it would make it impossible for the executive to make any decision for fear that the courts would intervene. The ruling party would then be waiting for the decisions of the courts and the results of appeal to higher courts[58].

Furthermore, the Explanatory Statement accompanying the Bill for the Internal Security (Amendment) Act 1989 echoed the explanation put forwarded by the Prime Minister as follows:

> This provision is necessary to avoid any possibility of the courts substituting their judgment for that of the Executive in matters concerning security of the country... In matters of national security and public order, it is clearly the Executive which is the best authority to make evaluations of available information in order to decide on precautionary measures to be taken and to have a final say in such matters; not the courts which have to depend on proof of evidence.[59]

The amendments were purposefully introduced to curtail the right to *habeas corpus* of detainees which was evident from the wordings of section 8B(1) which stated that:

> There shall be no judicial review in any court of law and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agung or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question or compliance with any procedural requirement in this Act governing such act or decision.

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[58] Charles Hector, 23 January 2006, *Detention without Trial Laws in Malaysia,* The Malaysian Bar, http://www.malaysianbar.org.my/human_rights/detention_without_trial_laws_in_malaysia_.html Site accessed on 4 July 2015.

[59] *Supra* n 40, at p.81.

Section 8C (c) which defines the term 'judicial review' included, among others, any proceedings instituted by way of a writ of *habeas corpus*. The effect of these two subsections can be gathered from the observation of the Federal Court in the case of *Ng Boon Hock v Penguasa, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors*[60]:

> …reading section 8B together with section 8C of the said Act, the only action anyone can take to court for any offence under the said Act is 'in regard to any question on compliance with any procedural requirement in this Act governing such act or decision'. This means that one can only challenge the act done or decision made by the Yang di-Pertuan Agung [the King] or the Minister on a question of non-compliance with any procedural requirement governing such act or decision.[61]

Following in the footsteps of the ISA, the two new Acts, namely the PCA and POTA also contain provisions that are worded identically to sections 8B(1) and 8C of the ISA. However, the wordings of the ouster clauses in these two Acts are inconsistent with the provisions which empower the Boards to detain individuals. The PCA and POTA, in sections 19A(2) and 13(10) respectively, on the one hand state that the 'direction' of the Boards concerning preventive detention shall be subject to review by the High Court but on the other hand, in sections 15A and 19, expressly prohibit judicial review of 'any act done or decision made by the Board in the exercise of its discretionary power' except on procedural grounds.

At the time of the passing of the PCA 2014, section 15A(2) which defines the term 'judicial review' did not include writ by way of a *habeas corpus* within its purview. However, with the passing of the Prevention of Crime (Amendment) Act 2015,[62] a new section 15A(ba) is introduced which includes a writ of *habeas corpus* within the ambit of 'judicial review.' Thus, similar to section 19(2)(c) of the POTA, the PCA also prohibits the bringing of an action by way of a writ of *habeas corpus*.

From the wordings of sections 15A of the PCA and 19 of the POTA, it is apparent that the provisions were drafted with the intention to oust the court's power to review all acts done or decisions made in the exercise of its discretionary powers. However, these sections did not incorporate the exact word 'direction' used in sections 19A(1) of the PCA and 13(1) of the POTA which enumerate the power of preventive detention. Therefore, in the absence of the express usage of the word 'direction' in the ouster clauses, it will depend on the interpretation of the judiciary whether such provisions can prevent the courts from reviewing the legality of the detention orders on substantive grounds. While interpreting these provisions, apart from giving effect to the intent of Parliament which it previously did in the ISA detention cases, the judiciary has to remind itself of its sacred duty of preserving the rights of the individuals who approach the courts for redress.

The above discussion of the relevant provisions reveal that Parliament has essentially resuscitated the oppressive preventive detention provisions of the repealed ISA, through

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60 [1998] 2 MLJ 174.
61 *Ibid.* at p.178.
62 Act A1484.

the new security Acts, especially the PCA and POTA. The Chairman of the Society for the Promotion of Human Rights, Datuk Kuthbul Zaman Bukhari opined in relation to the PCA that ''the reintroduction of preventive laws and detention without trial is akin to putting old wine into a new bottle''[63] and Datuk Raja Kamarul Bahrin Shah Raja Ahmad, MP of Kuala Terengganu and Wong Chen, MP of Kelana Jaya concerning the POTA articulated that the new Act is just a ''reincarnation of the ISA.''[64]

VI. Role of the Judiciary in Preventive Detention Cases

Judicial independence is a constitutional value which is vital to all democratic nations and is a check on the growth of authoritarianism.[65] Hon. P.N. Bhagwati lucidly puts it:

> The judiciary is [an] institution on which rests the noble edifice of democracy and the rule of law. It is to the judiciary that is entrusted the task of keeping every organ of the state within the limits of power conferred upon it by the constitution and the laws and thereby making the rule of law meaningful and effective.[66]

Prior to 1988, the Federal Constitution of Malaysia in Article 121 provided that – "the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status . . . and in such inferior courts as may be provided by federal law". However, through the Constitution (Amendment) Act 1988[67], this Article was amended and the present Article reads as follows:

> There shall be two High Courts of co-ordinate jurisdiction and status….and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

Sultan Azlan Shah detected troubling ramifications with this amended Article and remarked that:

> The precise reason for this amendment remains unclear. But the consequences may be severe. With this amendment, it would appear that the judicial power is no longer vested in the courts, and more importantly, the High Courts have been stripped of their inherent jurisdiction. Their powers are now only to be derived from any federal law that may be passed by Parliament.[68]

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63 June Moh, 12 August, 2014, *PCA: the return of an old foe.* The Ant Daily, <http://www.theantdaily.com/Article.aspx?ArticleId=15011> Site accessed on 13 June 2015.

64 *Supra* n 30.

65 *Supra* n 17, at p. 389.

66 *Supra* n 17, at pp. 388-389.

67 Act A704.

68 Raja Azlan Shah, *The Role of Constitutional Rulers and the Judiciary Revisited*, Visu Sinnadurai, ed., "Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches", (Kuala Lumpur: Professional Law Books, 2004), p. 385.

Sultan Azlan Shah drew attention to the Report by the International Commission of Jurists where it was signified that by making the jurisdiction and powers of the High Court dependent upon federal law meant that there could be no "constitutionally entrenched original jurisdiction".[69] The International Commission of Jurists in its report also stated that

> This undermines the separation of powers and presents a subtle form of influence over the exercise of judicial power. This makes the operation of the High Court dependent upon the legislature and is a threat to the structural independence of the judiciary.[70]

Even before the amendments, the Malaysian Judiciary's viewpoint in the ISA detention cases can be gathered from the judgment in the case of *Theresa Lim Chin & Ors v Inspector General of Police*[71] where it was observed that:

> In a proceeding like the present one where both the legislation and the executive act under it are challenged, our duties are not to substitute our decision for that of the executive. We are only concerned with the procedural aspects of the exercise of executive discretion. We have no interest, nor desire, to embark upon trespassing into the domains of the legislature or the executive.

After the 1988 constitutional amendment and 1989 amendment of the ISA, the Judiciary was more inclined to give effect to the intent of Parliament and refrained from exercising its power of judicial review of the detention orders on substantive grounds in majority of the cases under the ISA. This is especially so following the decision of the Federal Court in the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*[72] involving section 59A of the Sabah Immigration Act, an ouster clause[73]. The Federal Court held that:

> By deliberately spelling out that there shall be no judicial review by the court of any act or decision of the minister or the decision maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act[74]….In our view, Parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb a statutorily unreviewable decision[75].

Accordingly, in the case of *Kerajaan Malaysia & Ors v Nasharuddin Nasir*[76], the Federal Court stated that:

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69 *Ibid.* at p. 403.
70 *Ibid.* at p. 403. Cited Report on Malaysia, International Commission of Jurists, 13 August 2001.
71 *Supra* n 41.
72 [2002] 3 MLJ 72.
73 *Ibid.* at p. 91.
74 *Ibid.* at p. 92
75 *Ibid.*
76 [2004] 1 CLJ 81.

> the words in s. 8B are explicit. They are clear and precise. They are exclusionary in nature and effect. The intention of Parliament is unmistakably obvious i.e., that the jurisdiction of the court is to be ousted in terms stated in s. 8B. In the premises, adopting the test taken by the Federal Court in *Sugumar Balakrishnan*, the court must give expression to Parliament's intention.[77]

Since the amendment of Article 121 of the Constitution, the judicial power is now considered to be subject to the federal laws passed by the Parliament and is no longer vested in the Judiciary. In this context, the Court of Appeal's decision of *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor*[78] is worthy of quote where Gopal Sri Ram JCA, after referring to the Constitutions of Sri Lanka and India, stated that the absence of the express mention that the judicial power is vested in the judiciary does not necessarily mean that after the amendments the power is no longer with the judiciary. Gopal Sri Ram JCA opined that:

> … the Federal Constitution preserves the separation of powers between the three arms of Government and evinces no intention that the judicial power of the Federation shall be passed to or shared with the Executive or the Legislature. It follows that the judicial power of the Federation remains where it has always been, namely with the judiciary.[79]

Moreover, Bhagwati CJ in the case of *Sampath Kumar v. Union of India*[80] concerning the power of judicial review stated that "… judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is".

Therefore, the Judiciary while interpreting the ouster clauses incorporated in the PCA and POTA should not follow its precedents of the ISA detention cases where it abstained from reviewing the detention orders on substantive grounds. Rather, the Judiciary should interpret the clauses so as not to take away its power of reviewing the legality of the detention orders completely. An instance of such interpretation can be seen from the decision of the case of *Raja Petra Raja Kamarudin v Menteri Hal Ehwal Dalam Negeri*[81] where the High Court held that:

> the Minister's decision is not completely unfettered and arbitrary but is confined by the provisions of the Act in question, here the ISA….where the Minister has acted outside the purview of the express objects of the ISA, then he has acted outside the jurisdiction accorded to him by the Act. In short he has acted ultra vires the object of the Act. In such an instance the ouster clause does not come into play, or does not take effect. This result follows from a simple reading of the section 8B….

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77 *Ibid.* at p.95.
78 [1998] 3 CLJ 85.
79 *Ibid.* at p. 111.
80 [1987] SC 386.
81 [2008] 1 LNS 920.

> In order to ascertain whether the Minister has acted ultra vires the fundamental objects and provisions of the Act, the Courts are entitled to inspect and consider the grounds put forward by the Minister in explaining the basis for the issuance of the detention order.[82]

The Judiciary is the protector of the fundamental liberties of the citizens and this is a sacred duty or trust which the Judiciary must constantly uphold[83]. In the absence of judicial scrutiny on substantive grounds there will always remain the possibility of people being arbitrarily detained under the new preventive detention laws similar to the detainees under the ISA. It is well known that ISA has been used during its 52 years of operation, to suppress legitimate political dissent and for ulterior purposes. For instance, Raja Petra Kamarudin, editor of *Malaysia Today* on September 12, 2008 was arrested and detained for a period of two years under the ISA. It was claimed that the reason behind his detention was his charge that the then Deputy Prime Minister, Najib Tun Razak and his wife were involved in the murder of a Mongolian woman.[84] Furthermore Tan Hoon Cheng, a newspaper reporter was also arrested on the same day in 2008 for reporting a ruling party MP's racist statement that Chinese citizens of Malaysia are 'squatters and therefore not entitled to rights.'[85] There are more instances of such misuse of power which can only be prevented from recurring under the new preventive detention laws if the Judiciary can play an effective role. It should be stressed here that:

> the power of judicial review…is a most potent weapon in the hands of the judiciary for maintenance of the Rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the Rule of Law would become a teasing illusion and a promise of unreality.[86]

VII. Conclusion

Preventive detention has been claimed to be an imperative component of the Malaysian democracy since independence. Article 149 of the Federal Constitution was drafted with the intent to accommodate the Executive with the necessary power of preventive detention to deal with circumstances like communist insurgency in a non-emergency state. But over the years, the ISA has been heavily criticised for its usage as a weapon to suppress political dissent; criticism which led to the Prime Minister's announcement (on 15 September 2011), to the repeal of the ISA. Nevertheless, the repeal of the ISA did not liberate the legal system from the exercise of such powers as Parliament brought

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82 *Ibid.* at p. 937.

83 *Abd Malek bin Hussin v Borhan bin Hj Daud* [2008] 1 MLJ 368, 383.

84 James, T. & Jeffery, B, Preventive Detention in Malaysia: Constitutional and Judicial Obstacles to Reform and Suggestions for the Future. Georgia Journal of International and Comparative Law, 2013, Vol. 41:535, pp. 549-550.

85 *Ibid.* at pp. 549-550.

86 [1987] SC 386, p. 388.

back the oppressive provision of an indefinite period of preventive detention even before Malaysian citizens could breathe a sigh of relief.

The Prime Minister promised that the new laws which will replace the ISA will aim at maintaining peace and wellbeing and safeguard the rights of those involved[87]. But the above examination of the new laws reveal that these laws are also enacted in total disregard of the freedom of liberty of persons as these laws, similar to their predecessor, allow for an indefinite period of preventive detention. The Prime Minister guaranteed that no person will be detained under the new laws for their own political ideology and, to this effect, the SOSMA, PCA and POTA incorporated provisions stating that no person shall be detained for his political belief or political activity. It is pertinent to note that when individuals are detained under the security laws, the grounds shown on papers are for the maintenance of national security and public order rather than their political activities. There is no mechanism in place to ensure that people will not be detained for holding different political opinion and thus, the presence of such a provision in the new laws is a false safeguard.

It is undeniable that the power of preventive detention is necessary during exigencies but the government should be mindful that in a democratic country like Malaysia, the fundamental rights of the citizens should not be arbitrarily encroached upon in the disguise of the maintenance of national security. A balance has to be struck between the necessity of maintaining national security and the rights of the citizens not to be detained arbitrarily which can be ensured with an independent judiciary possessing its power of judicial review on substantive grounds over the detention orders and by providing adequate safeguards to the detainees of such laws.

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87 *Supra* n 6.